IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2226

INQUIRY CONCERNING A
JUDGE: CYNTHIA A. HOLLOWAY
NO.: 00-143

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JUDGE HOLLOWAY'S REPLY TO THE JQC'S ANSWER BRIEF IN RESPONSE TO SHOW CAUSE ORDER

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

FLORIDA RULES

SYMBOLS AND REFERENCES

The following abbreviations and symbols are used in this brief:

A.B.	=	Answer Brief
Findings	=	Findings, Conclusions and Recommendations by the Hearing Panel of the Judicial Qualifications Commission
H.T.	=	Hearing Transcript
JQC'S Response	=	JQC'S Response to Motion to Dismiss and Motion for Sanctions for Prosecutorial Misconduct

Special Counsel is unable to bolster the Hearing Panel's erroneous findings with respect to Judge Holloway's contact with Detective Yaratch and Judge Essrig. Instead, the Answer Brief merely parrots the Hearing Panel's comments that the contact with Detective Yaratch was not a breach of any judicial canon, but that Judge Holloway was nevertheless guilty of this charge based upon her other charged conduct. Similarly, the Answer Brief fails to substantiate the violation pertaining to Judge Essrig, which the Panel conceded was a "completely normal request" if made by anyone but a judge.

Both In re Frank, 753 So. 2d 1228 (Fla. 2000)[1], and

[1] This Court held that Judge Frank's expressing displeasure to Bar personnel handling a grievance proceeding was not improper, and stated that:

Knowledge that one is a judicial officer or respectful conduct in response to such knowledge does not automatically translate into a determination that a judicial position has been abused. Judge Frank did not forfeit the right to make proper inquiry concerning the pending matters simply because he held judicial office. A judicial officer should not be sanctioned simply because those with whom he or she has interaction are aware of the official position. The use of a judicial position or power of the position in an unbecoming manner requires more than simply someone being aware of one's position. The gravamen of the charge under the circumstances require that there be some affirmative expectation or utilization of position to accomplish that which otherwise would not have occurred. The testimony here demonstrates that those interacting with Judge Frank

In re McMillan, 797 So. 2d 560 (Fla. 2001)[2], indicate unequivocally that Judge Holloway's contacts with Detective Yaratch and Judge Essrig was not judicial misconduct. The JQC failed to mention or distinguish either case. Instead, the JQC cites to cases from other states to bolster these baseless charges. While each can be factually distinguished, they have no persuasive value since this Court has issued opinions which are mandatory authority.

Special Counsel asserts that Judge Holloway's contact with Judge Stoddard had an impact on the child remaining in shelter status. Clearly, the Hearing Panel rejected this assertion. Undaunted, Special Counsel continues to press this unsupported assertion in contravention of the record and the Findings. Special Counsel represented, "it is a **fact** that the child

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were aware of his position, but their actions, while respectful of his position, were none other than those normally expected under any other circumstance.

[2] This Court found that Judge McMillan falsely claimed that Judge Brown had sought preferential treatment in a police investigation. In this case, Judge Brown's children were being investigated by the Sheriff. Judge Brown contacted law enforcement to ask whether statements were taken from all of the witnesses. The officer testified that the judge was "demeaning" but did not seek special treatment for his children.

remained in a shelter for some additional length of time in part because of her improper conduct."[3] In contrast, the Hearing Panel determined,"We further find that Judge Holloway was not attempting to affect the shelter status of the child by contacting Judge Stoddard, and that this contact did not actually result in a prolonging of the shelter status."[4]

The Answer Brief criticizes Judge Holloway for not contacting Mark Johnson to personally inform him of her contact with Judge Stoddard. This issue was not referenced by the Hearing Panel. If Judge Holloway had an obligation to do so, it should have been included in the charges. Moreover, Special Counsel unfairly and irresponsibly implies that Judge Holloway accused Judge Stoddard of being "on the take." There is no support for this allegation. Respondent urges this Court to ignore efforts of Special Counsel to obfuscate weaknesses in the Hearing Panel's Findings and Recommendations by alleging additional ethical breaches by Judge Holloway.

The JQC has continuously asserted that judges who testify under oath are held to a higher standard than

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[3] JQC's Response, p. 8(emphasis in original).
[4] Findings of Fact at p. 21(emphasis added).

other deponents. While certainly judges and lawyers are held to a very high standard of conduct, judges do not have better abilities to recall information, to remember details, and to respond to inartful questions. The JQC has also taken the erroneous position that errata sheets and protective orders are not available to judges although available to others. Unfortunately, this misunderstanding has led to an improper decision by the Hearing Panel.

The JQC does not appear to understand how an errata sheet is to be utilized. In Motel 6, Inc. v. Dowling, 595 So. 2d 260 (Fla. 1st DCA 1992), the court held that the changes on the errata sheet are substituted for the original testimony as if given at the time of the original deposition.[5] Thus, under Motel 6, the answers that were provided on the errata sheet replace those in the original deposition and the substituted answers, not the original answers, become part of the final deposition

[5] In Motel 6, a witness made three substantive changes on an errata sheet three months after his deposition was taken. The errata sheet was filed two weeks before trial. No motions were filed to either reopen the deposition or to suppress the changes. The witness did not appear at trial, and both the original answers given during deposition along with the changes and the reasons for the changes were read, over objection, to the jury.

transcript. If Mark Johnson had chosen to reopen Judge Holloway's deposition or if Judge Holloway testified at the paternity final hearing, then she could have been cross-examined concerning the changes that she made on the errata sheet. In addition, Mark Johnson also had the option to file a motion to suppress the changes on the errata sheet and obtain a ruling from the court on whether the changes and the reasons for the changes were proper and admissible. However, there is no legal authority for the JQC's position that there are two official versions of the deposition transcript. If that were the case, there would be no reason to ever execute an errata sheet since any change would imply the correction of previous false testimony, even if the original testimony was inaccurately transcribed or the question was misunderstood.

Feltner v. Internationale Nederlanden Bank, 622 So. 2d 123 (Fla. 4th DCA 1993) restates the black letter law on errata sheets:

> Rule 1.310(e), Florida Rules of Civil Procedure permits a deposition witness to make changes "in form or substance" to a transcribed deposition by listing them in writing with the reasons given for making the changes. Like its federal counterpart, Federal Rule of Civil Procedure 30(e), the Florida rule places no limitations on the changes a deponent can make. Accordingly,

> the deponent can make changes of any nature, no matter how fundamental or substantial. However, if the changes are substantial, the opposing party can reopen a deposition to inquire about the changes.

In Feltner, the court permitted the reopening of a deposition after the deponent filed an errata sheet containing sixty-one changes. Feltner supports Judge Holloway's assertion that changes made on an errata sheet replace the erroneous answers on the original transcript. The JQC's contention to the contrary would render an errata sheet meaningless since "changes" would not actually change anything at all in the original transcript.

The JQC's reliance on Baker v. Myers Tractor Services, Inc., 765 So. 2d 149 (Fla. 1st DCA 2000) is misplaced. The Baker trial court voluntarily dismissed a case after finding that the plaintiff had "knowingly and intentionally concealed prior injuries to his right knee in an attempt to gain an unfair advantage" and that the plaintiff's "repeated lies" were central to the case. More than three months after the deposition and in response to the defense's motion to involuntarily dismiss the case based upon the material misrepresentations, the plaintiff filed an errata sheet changing his testimony on

these key issues. Baker is irrelevant to this Court's review. Baker did not involve confusion over vague and poorly articulated questions or concern the limitation or termination of a deposition to avoid harassment.

The JQC cites to authority from other jurisdictions despite clear Florida case law to the contrary. Mandatory authority from Florida should not be ignored in favor of decisions from distant jurisdictions, especially since other states are split on the interpretation of Federal Rule 30(e).

The real issue was not the effect of an errata sheet or how it might be admitted into evidence. Instead, the issue that seemed to confound the Hearing Panel was the propriety of Judge Holloway's intention to refuse to answer questions relating to her contact with Judge Stoddard and the ongoing JQC investigation instigated by Mark Johnson.[6] Either the Hearing Panel did not believe the uncontroverted testimony of Judge Holloway and her counsel on this issue, or the Hearing Panel believed that

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[6] The Hearing Panel found "we do not accept Judge Holloway's explanation that she intended and planned to answer absolutely no deposition questions regarding her contact with Judge Stoddard because she knew this was the subject of the JQC investigation prompted by Mr. Johnson's complaints. Findings of Fact at pg. 20.

judges are not entitled to the protections afforded to other deponents under Rules 1.280(c) and 1.310(d). In either case, it is respectfully submitted that the Hearing Panel's findings are not supported by the record and are contrary to Florida law.

Judge Holloway should be afforded the same protections under the discovery rules as are available to all deponents. Relying on Mr. Johnson's assurances that her deposition was going to be limited to information that Judge Holloway had about Mark Johnson's child and the paternity proceedings, Judge Holloway did not obtain a protective order in advance of the deposition. However, during the course of the deposition, Mark Johnson asked questions relating to Judge Holloway's contact with Judge Stoddard on March 5, 2000, and Judge Holloway's attorneys objected on the record and instructed her that she was not required to answer without having her objections heard by the court. Judge Holloway was entitled to follow her attorneys' advice. In addition, the record supports her explanation concerning her attorneys' decision to object to questions

about her contact with Judge Stoddard.[7]

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[7] The following portion of the deposition, pp. 39:16-44:14, should be considered:

Q.: Do you know why Judge Stoddard recused himself from –

Mr. Alley: Object. There is no relevance to this whatsoever. I'm going to direct her not to answer any more questions along this line. This has no relevancy to the proceedings that are going on.

Mr. Johnson: Well, okay. Let me see if I can find one then.

Mr. Alley: That's more relevant? I'd appreciate it.

Q: Are you aware that courthouse personnel have told Ron Russo that Judge Stoddard's recusal was based in part of contact that you had with him?

Mr. Brooks: Which courthouse personnel are you talking about?

Mr. Johnson: Depose me and I'll answer it.

Mr. Brooks: Don't answer unless he identifies the courthouse personnel, Judge.

Q. You don't want to answer it?

Mr. Alley: Would you like to rephrase the question?

Q. Did you ever have anything to do with Judge Stoddard's recusal?

Mr. Alley: I've already told you I'm not going to have her discuss anything about that. It has no relevance to your case, sir, none. We're here to testify as to – as far as I know, Judge Holloway is a witness on a witness list and has testified about an incident at Jackson's and whether or not she believes Robin Adair to be a competent mother, and that's what we're here to testify about.

Mr. Holloway: And the basis for instructing the witness not to answer is we believe you're simply attempting to harass this witness. And the rules provide that we can instruct her not to answer if it's our opinion that you're attempting to harass –...

Q. Would it therefore be appropriate for you to lend your judicial authority or your office

Based upon the relevant case law, Judge Holloway's deposition answers, as lawfully corrected on the errata sheet, did not constitute false or misleading testimony. Moreover, even if Judge Holloway had never submitted an errata sheet, her denial that she had contacted Judge Stoddard was merely a mistaken response based on her understanding that Mr. Johnson's question only pertained to the Saturday of the shelter hearing. Inaccurate but mistaken testimony is not judicial misconduct. See In re Davey, 645 So. 2d 398, 406-07 (Fla. 1994).

Special Counsel offers only two Florida cases, In re Wilson, 750 So. 2d 631 (Fla. 1999) and In re Leon, 440 So. 2d 1267 (Fla. 1983) as analogous legal precedent supporting the Hearing Panel's recommendation as to the appropriate sanction. Both cases concern more egregious conduct than the present matter. To justify the thirty

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resources, such as the use of your office assistant to make inquiries or to do anything else in this case?

Mr. Brooks: Object as to relevance.
Mr. Holloway: Objection. Intended to harass the witness.
Mr. Brooks: I'll join that as well.
Mr. Holloway: It's clearly not relevant. You're merely asking Judge Holloway these questions to harass her and I'm going to instruct her not to answer.
Mr. Johnson: That's fine. I don't have anything else.

day suspension, Special Counsel felt compelled to assert that Judge Holloway's conduct was "far worse" than the actions of Judge Wilson which only warranted a public reprimand and a ten day suspension. (A.B., p. 42); In re Wilson. However, Special Counsel minimized the facts of Wilson in order to reach this conclusion. For example, compare the following recitation of the Wilson facts with the reported facts, "Judge Wilson was an observer to a criminal violation [Judge Wilson joined a group of intoxicated people at Denny's Restaurant where she observed them handle a Denny's surveillance camera and later that night witnessed these friends with the stolen camera at a residence], she failed to report it [she lied to employees of Denny's when asked about the incident and then asked them not to identify her to police] and obstructed law enforcement [she lied to the investigating officers until she was informed that other witnesses had implicated her]."(A.B. at 42): Wilson at 632.

Special Counsel then exaggerated the findings in this case by arguing that Judge Holloway "initiated improper contact with the investigating officer and presiding judge to influence the outcome of the proceeding" and "misled the investigating officer about

her involvement in the custody case and purported observations of the minor child's behavior." Yet, the Hearing Panel found that Judge Holloway's contact with Detective Yaratch was "little more" than the appropriate law enforcement contact by Judge Brown and Judge Frank. (Findings at 19). In addition, the Hearing Panel never referenced a charge or finding that Judge Holloway "misled" Detective Yaratch about her "purported" observations. (Findings, pp. 4, 19-20.) While Judge Holloway admitted that her contact with Judge Stoddard was "absolutely improper," the Hearing Panel specifically found that she "was not attempting to affect the shelter status of the child." (Findings, p. 21). Further, the Hearing Panel rejected "the assertion that Judge Holloway intentionally lied in her deposition and then intentionally lied in her errata sheet" but found her answers misleading. (Findings p. 22.) A fair comparison between the Hearing Panel's findings in this case and the facts set forth in Wilson shows that Judge Holloway's conduct does not warrant a greater sanction than the ten day suspension imposed against Judge Wilson.

Special Counsel next asserts that the present case "most resembles" In re Leon, 440 So. 2d 1267 (Fla. 1983),

in which the responding judge was ultimately criminally charged and imprisoned for the underlying misconduct. Special Counsel's recitation of the Leon facts show only an illusory similarity to the reported facts.[8] Judge Leon was found to have engaged in ex parte conversations with another judge and a prosecutor concerning the dispositions of two criminal cases, of "improperly securing the alteration" of a defendant's sentence, of fraternizing with and engaging in business transactions with the father of a defendant while presiding over the case, of conspiring with the other judge to lie about their ex parte communications and of lying to the investigating commission member. Leon at 1268. Special Counsel's attempt to analogize the present case to Leon is unpersuasive and misleading.

Similarly, Special Counsel's citation to and summary of cases from other jurisdictions fail to accurately set forth the reported facts in an apparent attempt to argue that less egregious misconduct required suspension. Referring to Matter of Lewis, 535 N.E. 2d 127 (Ind.

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8. Special Counsel wrote, "Leon engaged in improper ex parte communications with another judge regarding the disposition of criminal cases involving the daughter of a friend and then falsely denied such ex parte communications." A.B. at 43.

1989), Special Counsel represents that a four year suspension was imposed for a "discussion" of pending charges against a personal friend and was not removed because of extensive mitigating circumstances. (A.B. at 45.) However, Judge Lewis admitted to engaging in **numerous** ex parte discussions concerning the merits of criminal cases pending in his division. The Indiana Supreme Court held that "Respondent's conduct was not limited to casual discourse with individuals concerned with matters then pending before Respondent" and that the "Respondent freely and openly discussed the merits of the controversy in an atmosphere which is without justification in the professional resolution of disputes." Id. At 129. In essence, Judge Lewis appeared to informally dispense justice based on "favors" owed to him and other officials. There is no remotely similar allegation that Judge Holloway mishandled the cases before her and her conduct is clearly distinguishable.

Special Counsel also maintains that in In re Kroger, 167 Vt. 1, 702 A. 2d 64 (Vt. 1997), the Vermont Supreme Court imposed a one year suspension for making "false **or** deceptive" statements at a public hearing. (A.B. at 45).

(emphasis in the original). Presumably, Special Counsel used the phrase "false **or** misleading" to argue that the one year suspension was imposed even if the statements were only deceptive and not false. However, the Kroger Court found that the judge had "knowingly made false statements" under oath at a public hearing concerning accusations that she had surreptitiously tape recorded her conversation with another judge. 702 A. 2d 64,72. In contrast, the Hearing Panel specifically rejected a finding that Judge Holloway had intentionally lied in either her deposition or on her errata sheet. Even if the Court finds that her answers were misleading, but not intentionally false, the Kroger decision is distinguishable and is not persuasive authority.

Special Counsel also cites In re Judicial Disciplinary Proceedings Against Carver, 192 Wis. 2d 136, 531 N.W. 2d 62 (Wis. 1995), in which the responding judge was suspended for fifteen days. The facts set forth in the Answer Brief are not entirely complete and fail to convey the seriousness of the conduct. In Carver, the judge had been advised that he was previously a target of an investigation concerning sports gambling. Judge Carver's friend was charged in this investigation and his

case was assigned to his courtroom. The friend wrote two letters to the judge concerning the case. Judge Carver did not immediately recuse himself from his friend's case and instead took the opportunity to express his opinion on the record. When the judge was specifically asked about any contact between him and the defendant, the judge lied and stated that he had not been contacted. Judge Carver lied and mishandled a case in order to taint the prosecution with his judicial disapproval. As found by the Hearing Panel, the present case concerns Judge Holloway's emotional outburst to Judge Stoddard with no intent to affect the proceedings and giving a misleading answer in her deposition and errata sheet. Certainly, her conduct does not warrant a greater sanction than that imposed against Judge Carver.

Special Counsel laments that it does not have a right to a cross-appeal. (A.B. at 47). It is inconsistent for Special Counsel to argue that no prosecutorial misconduct has taken place, that no "win at all costs" attitude exists, and that these proceedings were conducted in a fair and impartial manner while at the same time asking this Court to ignore the Hearing Panel's findings and criticizing the recommended

punishment as lenient. These contrary positions provide the best insight to this Court concerning the irregularities in these proceedings. Judge Holloway has been repeatedly faced with a fractured JQC, fraught with infighting and squabbles over jurisdiction and evincing a disregard for mandates from this Court and the Florida Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of April, 2002, the original of the foregoing Judge Holloway's Reply to the JQC's Answer Brief in Response to Show Cause Order has been furnished by UPS overnight delivery to: Honorable Thomas D. Hall, Clerk, Supreme Court of

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CERTIFICATE OF FONT SIZE AND STYLE

The undersigned counsel does hereby certify that the font size and style of type used in this brief is 12 point Courier New.

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